Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-792 and 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

KENNETH P. KOLSON
ASSOCIATION OF
AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

June 7, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	9
I. THE COMMISSION ADEQUATELY EXPLAINED ITSELF	9
II. THE COMMISSION'S CONCLUSIONS WERE CORRECT	10
A. The Interstate Commerce Act Provides A Comprehensive Scheme Encouraging Rail Consolidation And Protecting the Interests of Labor	10
B. The Railway Labor Act, If It Applied, Would Interfere With and Could Defeat the Goals of the Interstate Commerce Act	13
C. The ICC, Following *BLE* v. *CNW*, Rightly Ruled That the Railway Labor Act Is Superseded	16
D. Override of the Railway Labor Act Is Required in This Case	20
III. SECTION 11341(a) IS SELF-EXECUTING	21
IV. THE 4-R ACT DID NOT AMEND THE LAW TO ALLOW THE RAILWAY LABOR ACT TO INTERFERE WITH TRANSACTIONS APPROVED BY THE COMMISSION	24
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

American Airlines v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) 7
Anderson v. *Norfolk & Western Ry. Co.*, 773 F.2d 880 (7th Cir. 1985) 30
Bowman Transp., Inc. v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281 (1974) 9
Brotherhood of Locomotive Engineers v. *Boston and Maine Corp.*, 122 LRRM 2020 (1st Cir., April 9, 1986) 18, 23
Brotherhood of Locomotive Engineers v. *Chicago and North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) ..... *passim*
Brotherhood of Maintenance of Way Employes v. *United States*, 366 U.S. 169 (1961) 11, 17
Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 14
Bundy v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972) 18
Burlington Northern, Inc. v. *American Railway Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) 18
Burlington Northern R.R. v. *UTU*, No. 86-5013-CV-SW-C (D. Mo.) 16
Chicago & E.I. R. Co. Trackage Rights, 254 I.C.C. 603 (1943) 3
Colorado Interstate Gas Co. v. *FPC*, 324 U.S. 581 (1945) 7, 10
Congress of Railway Unions v. *Hodgson*, 326 F. Supp. 68 (D.D.C. 1971) 25, 28
Detroit and Toledo Shore Line R.R. v. *UTU*, 396 U.S. 142 (1969) 14
Division 1287, Amalgamated Transit Union v. *Kansas City Area Transp. Authority*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) 28
Division No. 14, Order of R.R. Tel v. *Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) 12
Dixie Cotton Oil Co. v. *St. Louis, I. M. & S. Ry.*, 27 I.C.C. 295 (1913) 2

TABLE OF AUTHORITIES—Continued

Page

Edmonds v. *Compagnie Generale Transatl.*, 443 U.S. 256 (1979) 26
Elgin, Joliet & Eastern Ry. v. *Burley*, 325 U.S. 711 (1945) 14
Employees Protective Ass'n v. *Norfolk & Western Ry.*, 511 F.2d 1040 (4th Cir. 1975) 30
Engineers v. *Burlington Northern, Inc.*, 92 LRRM 3436 (D. Minn. 1976) 20
Guilford Transp., Ind., Inc.—Control—Boston and Maine Corp., 366 I.C.C. 292 (1982), *affirmed in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983) 15
Guilford Transp. Ind., Inc.—Control—Delaware and Hudson Ry., 366 I.C.C. 396 (1982), *affirmed in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983) 15
Gulf, M. & N. R. Co. Abandonment of Operations, 233 I.C.C. 294 (1939) 3
Hayfield Northern R.R. v. *Chicago and North Western Transp. Co.*, 467 U.S. 622 (1984) 27
International Ass'n of Machinists v. *Boston and Maine Corp.*, No. 84-3703-T (D. Mass.) 15
International Ass'n of Machinists v. *Northeast Airlines*, 400 F. Supp. 372 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) 19
International Ass'n of Machinists v. *Northeast Airlines*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) 7
International Ass'n of Machinists v. *Northeast Airlines*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) 7
ICC v. *Columbus & Greenville Ry.*, 319 U.S. 551 (1943) 10
ICC v. *Railway Labor Exec. Ass'n*, 315 U.S. 373 (1942) 5, 6
Jackson Transit Authority v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982) 28

TABLE OF AUTHORITIES—Continued

	Page
Kent v. *CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953)	7, 19
Locomotive Engineers v. *New York Dock Rail Road*, 94 Labor Cases ¶ 13,704 (E.D.N.Y. 1981), *subsequent opinion*, 97 Labor Cases ¶ 10,007 (E.D.N.Y. 1982)	29
Missouri Pac. R.R. v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *pdg. on pet. for a writ of cert.*, No. 85-1054	18
Missouri Pac. R.R. v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *pdg. on pet. for a writ of cert.*, No. 85-1054	4
Nemitz v. *Norfolk & Western Ry.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971)	19
New York Dock Ry.—Control—Brooklyn Eastern District, 360 I.C.C. 60, *aff'd*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979)	6, 13, 26, 29
Norfolk and Western Ry. v. *Nemitz*, 404 U.S. 37 (1971)	18
Norfolk and Western Ry.—Trackage Right—BN, 354 I.C.C. 605 (1978), *as modified by, Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd, Railway Labor Exec. Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982)	13, 29
Oregon Short Line R.R. Co.—Abandonment—Goshen, 354 I.C.C. 76 (1977)	25, 28
Oregon Short Line R.R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979)	6
Railway Clerks v. *Florida East Coast Ry.*, 384 U.S. 238 (1966)	14, 15
Railway Labor Exec. Ass'n v. *Butte, Anaconda and Pac. R.R.*, No. 85-3875 (9th Cir.)	7
Railway Labor Exec. Ass'n v. *ICC*, 784 F.2d 959 (9th Cir. 1986)	5, 11

TABLE OF AUTHORITIES—Continued

	Page
Railway Labor Exec. Ass'n v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986)	7, 15
Railway Labor Exec. Ass'n v. *United States*, 339 U.S. 142 (1950)	12, 17
Schwabacher v. *United States*, 334 U.S. 182 (1948)	22
Shepard v. *NLRB*, 459 U.S. 344 (1983)	10
Simmons v. *ICC*, 760 F.2d 126 (7th Cir. 1985)	6
Simmons v. *ICC*, 766 F.2d 1177 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 791 (1986)	6
Southern Ry. Co.—Control—Control of Georgia Ry. Co., 331 I.C.C. 151 (1967)	28
Texas & New Orleans R.R. v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963)	19, 20
Texas and New Orleans R.R. v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930)	14
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946)	2
Transit Comm'n v. *United States*, 289 U.S. 121 (1933)	2
Union Pacific-Control-Missouri Pacific, 366 I.C.C. 462 (1982), *aff'd*, *Southern Pacific Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1171, 1172 (1985)	3
United States v. *Lowden*, 308 U.S. 225 (1939)	5, 11, 20
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946)	10
UTU v. *Norfolk & Western Ry.*, 332 F. Supp. 1170 (N.D. Ohio 1971)	18, 19
Watt v. *Alaska*, 451 U.S. 259 (1981)	26

STATUTES:

Civil Aeronautics Act, as amended:	
49 U.S.C. app. § 1378 (1982 ed.)	7, 19
Interstate Commerce Act, as amended:	
49 U.S.C. § 10505	5, 7, 18

TABLE OF AUTHORITIES—Continued

	Page
Chapter 109	4, 5, 6, 7, 15
49 U.S.C. § 10901	4, 5
49 U.S.C. § 10903	4, 5
49 U.S.C. § 10905	4, 6
Chapter 113	*passim*
49 U.S.C. § 11341	*passim*
49 U.S.C. § 11343	*passim*
49 U.S.C. § 11344	8, 12, 22, 23
49 U.S.C. § 11347	*passim*
National Labor Relations Act, as amended:	
Section 8(e), 73 Stat. 543, 29 U.S.C. § 158(e)	10
Norris-LaGuardia Act	
49 Stat. 70 (1932)	19
Rail Passenger Service Act of 1970 ("Amtrak Act"), Pub. L. No. 91-518, 84 Stat. 1327 (1970):	
Section 405, 84 Stat. 1337	25, 27
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)	*passim*
Section 101, 90 Stat. 33, 45 U.S.C. § 801	11
Section 401, 90 Stat. 61-62	12
Section 402, 90 Stat. 62	24, 26
Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*	*passim*
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980)	6
Transportation Act of 1920, 41 Stat. 456 (1920)	11
Transportation Act of 1940, 54 Stat. 898 (1940)	2, 5, 11, 12,17
Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C. app. 1609(c)	27

MISCELLANEOUS:

121 Cong. Rec. 41340 (1975)	27
H.R. 10979, 94th Cong., 1st Sess. (1975)	26

TABLE OF AUTHORITIES—Continued

Page

H.R. Rep. No. 94-725, 94th Cong., 1st Sess. (1975) 26
S. 2718, 94th Cong., 1st Sess. (1975) 26
S. Rep. No. 94-499, 94th Cong., 1st Sess. (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14 11
1 I.L. Sharfman, *The Interstate Commerce Commission* (1931) 11
Supplemental Hearings on H.R. 17849 and S.3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) 27

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether labor-management disagreements arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. This question is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and misunderstands the effect of an approval by the Commission under the Interstate Commerce Act. It threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions by operation with their own crews as traditionally has been done—which is the subject of this case—but also other kinds of transactions approved by the Commission. The AAR and the NRLC accordingly file this brief in support of the petitioners herein.[1]

STATEMENT

This case has its beginning in the approval by the Interstate Commerce Commission of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads. To ameliorate the anticompetitive effect of that merger, the Commission simultaneously granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP.[2] And to protect the interests of any employees who might be adversely affected by the exercise of those rights, the Commission imposed on the carriers certain "employee

---

[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

[2] It has long been "a well-recognized practice among carriers to agree as to trackage rights and privileges between one another for the common use of a part of the line of one in such a manner as to make the tracks subject to the agreement a part of both roads." *Dixie Cotton Oil Co.* v. *St. Louis, I. M. & S. Ry.*, 27 I.C.C. 295, 297 (1913). The acquisition of trackage rights by a carrier "constitute[s] an 'extension' of its own railroad" and "serves the same purpose as would the acquisition of such lines by purchase or the construction by it of a like extension * * *." *Transit Comm'n* v. *United States*, 289 U.S. 121, 128-129 (1933). The Transportation Act of 1940 gave the Commission "explicit powers over trackage rights," including "fixing terms and conditions * * * for any trackage agreements entered into * * *." *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146 (1946).

protection" obligations, more fully described below. *Union Pacific-Control-Missouri Pacific*, 366 I.C.C. 462 (1982), *aff'd, Southern Pacific Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984).

The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the option of doing so. (Pet. App. 62a.)[3] When the tenant carriers exercised their trackage rights the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees. They argued that the tenants' operation of their own trains with their own crews over MP tracks amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only through collective bargaining pursuant to the major dispute procedures of the Railway Labor Act; and that the Commission has no power under the Interstate Commerce Act, to authorize a transaction effecting such a change without resort to the procedures of the Railway Labor Act. (Pet. App. 57a-59a.)[4]

---

[3] "Pet. App." references are to the Appendix to the petition of the Interstate Commerce Commission. Operation by the tenant carrier "with its own engines and crews * * * is the usual method by which one carrier uses tracks of another." *Gulf, M. & N. R. Co. Abandonment of Operations*, 233 I.C.C. 294, 297 (1939). Indeed, it has been held that an agreement under which the owner carrier "would furnish all necessary locomotives and crews" is not a true trackage-rights agreement, which "necessarily include[s] an operating right" in the tenant carrier. *Chicago & E.I. R. Co. Trackage Rights*, 254 I.C.C. 603, 604, 605 (1943).

[4] Both the BLE and the UTU participated in the initial ICC proceeding and opposed the trackage rights applications generally. Neither, however, opposed the applications insofar as they would allow the tenants to use their own crews and neither raised that issue on appeal to the D.C. Circuit from the approval of the applications. Moreover, those unions also represent employees of the tenant carriers. The record shows that the unions, on behalf of those

In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *pdg. on pet. for a writ of cert.*, No. 85-1054.

The Commission rejected the unions' arguments. It concluded, among other things, that the tenants were free to use their own crews, even if that did amount to a change in the working conditions of MP employees, because the Railway Labor Act did not apply but had been superseded for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 60a.)

A divided court of appeals found the Commission's explanation inadequate. It sought to distinguish the case on which the Commission relied, and it vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a, footnote omitted.)

INTRODUCTION AND SUMMARY OF ARGUMENT

1. *Introduction.* The Interstate Commerce Act contains, in Chapters 109 and 113 of Title 49 of the U.S. Code, a comprehensive and meticulous scheme for the regulation of changes in rail carrier control or operation. Chapter 109 ("Licensing") governs the extension or construction of a line of railroad (§ 10901), the sale of a line of railroad from a carrier to a noncarrier (*id.*), the abandonment of a line or the discontinuance of operations over a line (§ 10903), and the purchase of a line noticed and approved for abandonment (§ 10905). Chap-

---

employees, have entered into agreements with the MKT—pursuant to the procedures prescribed by the Interstate Commerce Act—regarding the crewing of MKT's trains used in trackage-rights operations.

ter 113 ("Combinations") governs the consolidation and merger of carriers, purchases or leases or contracts to operate the properties of other carriers, acquisitions of control, and acquisitions of trackage rights over another carrier's lines (§ 11343). Before any of these actions may be taken the approval of the Interstate Commerce Commission is required.[5]

Under that statutory scheme the Commission for nearly 50 years has had power to impose employee protections as a condition of its approval of most of the actions just described. Thus, before 1940 the Commission in its discretion and without specific authority imposed protections as a condition of its approval of transactions now falling under Chapter 113. *United States* v. *Lowden*, 308 U.S. 225 (1939). Such protections were required after the Transportation Act of 1940, which "made mandatory with respect to unifications the protections for workers that had previously been discretionary." *ICC* v. *Railway Labor Exec. Ass'n*, 315 U.S. 373, 379 (1942) (footnote omitted). Similarly, before 1976 the Commission had and exercised discretionary power to impose conditions under the predecessors to Chapter 109 provisions. See *id.* In that year the Railroad Revitalization and Regulatory Reform Act amended those provisions to require protections in the case of abandonments (§ 10903) and to codify the Commission's discretion in the case of acquisitions and extensions or constructions of rail lines (§ 10901).[6] See *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 945 (9th Cir. 1986).

---

[5] Under § 10505, the Commission may exempt "a person, class of persons, or a transaction or service" from requirements of the Act, including those contained in Chapters 109 and 113, but such an exemption does not "relieve a carrier of its obligations to protect the interests of employees as required" in those chapters (§ 10505(g)). Hence, the preemptive effect upon the Railway Labor Act is the same regardless of whether the Commission approves a transaction under applicable provisions of Chapter 109 or 113 or exempts the transaction from those provisions.

[6] The one exception to the foregoing is that the Commission has no power to impose protections in connection with the purchase of a

Chapters 109 and 113 share more than a common history of the Commission's power to impose protections. Both chapters have the goal of an efficient and economic rail transportation system, see *ICC* v. *Railway Labor Exec. Ass'n, supra*, 315 U.S. at 376; the justifications for protections as recognized by this Court apply equally to both chapters, see *id.*, 315 U.S. at 377; the protections that the Commission imposes under both chapters are virtually identical;[7] and the Railway Labor Act, if it applied, would frustrate and possibly block altogether transactions under both chapters approved by the Commission as being in the public interest. For these reasons the *amici* Association of American Railroads and National Railway Labor Conference believe that the Railway Labor Act is overridden by the Interstate Commerce Act with respect to *all* transactions subject to Commission approval, whether falling under Chapter 109 or 113.

This case involves a trackage rights transaction, covered by Chapter 113. As we show below, there is an additional reason for concluding that the Railway Labor Act is superseded with respect to Chapter 113 transactions—namely, the provision in § 11341(a) that carriers participating therein are "exempt * * * from all other laws * * * as necessary to * * * carry out the transaction." But neither the presence of that provision in Chapter 113, nor our reliance on it in this case, detracts from the force of the arguments that the Railway Labor

---

line approved for abandonment under § 10905 (added by the 1976 Act but significantly amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 402(c), 94 Stat. 1895, 1942-45). *Simmons* v. *ICC*, 766 F.2d 1177 (7th Cir. 1985); *Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

[7] Compare *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, *affirmed, New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) (merger protections under Chapter 113), with *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (abandonment protections under Chapter 109).

Act is superseded by Chapter 109 as well.[8] The *amici* make this point out of a concern that a decision by this Court favorable to petitioners in this case that relied on the presence of § 11341(a) in Chapter 113 could conceivably be construed by lower courts to prejudice the position of carriers in cases arising under Chapter 109.[9]

2. *Summary.* We show in Part I below that the court of appeals erred in ruling that the Commission's explanation for its conclusion was inadequate. The Commission's decision set forth the union's claims, and then the reasons for rejecting them. It relied heavily on, and adopted as its own, the reasoning behind *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), which held that the Railway Labor Act is superseded by the Interstate Commerce Act in cases such as this one. In short, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945).

In Part II we address the merits of the Commission's conclusions. We show that the procedures for resolving disputes under that Act, which at their end contemplate the union's right to strike if its demands are not met, must yield to the mandatory arbitration provisions prescribed by the Commission as the means for resolving

---

[8] We are supported in our view of the preemptive effect of Chapter 109 by the experience under the Civil Aeronautics Act. Labor protections imposed on air carriers under that Act have been held to supersede inconsistent agreements under, or provisions of, the Railway Labor Act without reference to any express statutory exemption. *E.g.*, *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953); *accord*, *International Ass'n of Machinists* v. *Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972); *International Ass'n of Machinists* v. *Northeast Airlines*, 536 F.2d 975 (1st Cir. 1976); *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971).

[9] Pending cases involving the relationship between Chapter 109 (either directly or indirectly by reason of a § 10505 exemption) and the Railway Labor Act include *Railway Labor Exec. Ass'n* v. *Butte, Anaconda and Pac. R.R.*, No. 85-3875 (9th Cir.) and *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986).

disputes stemming from carrier efforts to implement transactions the Commission has approved as being in the public interest. A contrary result would mean that labor, already entitled in many instances under the Interstate Commerce Act to federally imposed protections unparalleled elsewhere in American industry, would have a veto power over the implementation by carriers of approved transactions. As a host of lower court decisions supporting our view demonstrates, Congress meant to encourage rail consolidations under the Interstate Commerce Act, and could not have meant to frustrate that goal by giving rail labor, in addition to the statutorily mandated protections, the right to delay or block those transactions altogether.

3. In Part III we support the Commission's construction of § 11341(a) as self-executing. That section of the Interstate Commerce Act requires no action by the Commission whatever. The factors required to be considered by the Commission appear in §§ 11343 and 11344. Once the Commission after considering those factors approves a transaction, a question may subsequently arise as to whether or not it is "necessary" under § 11341(a) for the carrier participants to be relieved of the operation of some other law, but the answer will ordinarily not depend on whether the Commission has made any "necessity" determination as part of its decision approving the transaction in the first place.

4. Finally we show that the unions err in contending that the Railroad Revitalization and Regulatory Reform Act of 1976 amended the Interstate Commerce Act to somehow revivify the role of the Railway Labor Act in the implementation of ICC-approved transactions. The provision in the 4-R Act on which the unions rely was added without a shred of debate and it is inconceivable that Congress was effecting so major a change in the law, and introducing so large a hurdle to the accomplishment of the goals of the Interstate Commerce Act, without a word being said about the matter by any member of Congress or any representative of rail labor or management.

ARGUMENT

I. THE COMMISSION ADEQUATELY EXPLAINED ITSELF

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that] transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission than went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to

> congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*, 314 F.2d 424, 430-31 (8th Cir. 1963)] is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter "*BLE* v. *CNW*"), and its adoption of the reasoning there as its own, make clear the basis for its finding that the crew selection provisions of the approved trackage rights agreements were exempt from the provisions of the RLA.[10] In short, while the organization of the decision of the Commission may not be flawless, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-33 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

II. THE COMMISSION'S CONCLUSIONS WERE CORRECT

A. The Interstate Commerce Act Provides A Comprehensive Scheme Encouraging Rail Consolidations And Protecting the Interests of Labor.

The Interstate Commerce Act favors rail mergers and other types of rail consolidations. That has been true for over 60 years. The post-World War I period was a time of great uncertainty and financial crisis for the nation's

---

[10] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

railroads, largely because of waste and inefficiency caused by extensive duplication of facilities and services.[11] Congress responded with the Transportation Act of 1920, 41 Stat. 456, where "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * *." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939). That Act, however, left consolidation largely to the Commission's efforts, and proved insufficient to its end. Congress accordingly reaffirmed and reinforced the national policy by giving rail carriers principal authority to initiate unifications in the Transportation Act of 1940, 54 Stat. 898, the chief goal of which was " 'to facilitate merger and consolidation in the national transportation system.' " *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, continued pursuit of the national policy. It "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures." *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986). It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority [for mergers] in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority * * *." § 101(a)(2), 90 Stat. 33, 45 U.S.C. § 801(a)(2).[12]

---

[11] See 1 I. L. Sharfman, *The Interstate Commerce Commission* 172-173 (1931).

[12] See Senate Rep. No. 94-499, 94th Cong., 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34 ("Title IV of this bill is intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the

Throughout this entire period the Commission's approval has been required for mergers, consolidations and other transactions falling within what is now § 11343. The Commission's jurisdiction over these transactions is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other law * * * as necessary to let that person carry out the transaction * * *." § 11341(a).

A more efficient and hence viable rail transportation system will ultimately benefit the public at large and preserve jobs for rail labor. Yet Congress has long recognized that the economies it sought to encourage through rail mergers are often achieved by the abolishment of duplicative facilities, resulting in the dismissal of employees or their displacement to lower paying jobs.[13] Its response, since the Transportation Act of 1940, has been to require the Commission in determining whether to grant an application subject to § 11343 to consider (among other things) "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347. The Commission accordingly has established a comprehensive set of "protections" to be afforded em-

---

Nation's rail system, and requires the Commission * * * to reach a [prompt] decision * * *." Section 401 "empowers the Secretary to develop plans, proposals and recommendations for mergers, consolidations and other coordination projects * * *.").

[13] See *Railway Labor Exec. Ass'n* v. *United States*, 339 U.S. 142, 147-148 (1950), noting "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations * * * could be realized only at the expense of displaced railroad labor" and that "[t]he legislative history of § 5(2)(f) [now § 11347] shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations."; *Division No. 14, Order of R.R. Tel.* v. *Leighty*, 298 F.2d 17, 17-18 (4th Cir. 1962).

ployees adversely affected as a result of approved rail mergers, consolidations and common control transactions,[14] and lease and trackage rights transactions.[15]

Under these protective conditions, an employee who is dismissed from a job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he or she was earning at the time of the adverse effect, indexed in accordance with subsequent general wage increases; moving expenses are provided if relocation is necessary; and transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other contract rights of affected employees. In addition, if the carrier and the union representing its affected employees are unable to come to terms over an implementing agreement, the parties must submit their dispute to expedited, binding arbitration. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

B. The Railway Labor Act, If It Applied, Would Interfere With and Could Defeat the Goals of the Interstate Commerce Act.

The carefully constructed statutory scheme we have just described would be set at naught if unions could insist that carriers, in addition to securing the approval of the Commission to engage in the transactions listed in § 11343, and complying with the employee protective

---

[14] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *affirmed*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The Second Circuit's decision in this case contains an extensive history of the conditions imposed over the years by the Commission.

[15] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *affirmed*, *Railway Labor Exec. Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982).

conditions imposed by the Commission under § 11347, must also follow the "major dispute" procedures of the Railway Labor Act ("RLA") before consummating a transaction that the Commission has approved as being in the public interest.

"Major" disputes arise under that Act when labor or management seeks to change the rates of pay, rules, or working conditions established in existing collective bargaining agreements. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[16] It is not un-

---

[16] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes";

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

common for the procedures to drag on for two years or more. At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

Those demands may be inconsistent with the carrier's ability to implement the transaction approved by the Commission, as an example may illustrate. Recently the Commission approved the common control of three railroads in the Northeast.[17] It did so because common ownership would produce "substantial" public benefits in several areas, including operating efficiencies to be "achieved through consolidation of maintenance and repair facilities."[18] Yet when the carriers sought to consolidate their facilities the International Association of Machinists sued to prevent them from doing so, arguing that the carriers were obliged to bargain under the RLA over demands by the union that each of three carriers add to its collective bargaining agreement a provision effectively barring the transfer of repair work from one carrier to another. Those demands, if agreed to by the carriers, would have forbidden the consolidation.[19]

---

[17] *Guilford Transp. Ind., Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 292, 338 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Ind., Inc.—Control—Delaware and Hudson Ry. Co.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

[18] 366 I.C.C. at 338; see also *id.* at 402.

[19] Complaint in *International Assoc. of Machinists* v. *Boston and Maine Corp.*, No. 84-3703-T (D. Mass.). A Stipulated Order of Dismissal ended the case on February 24, 1986.

Another recent example (though arising under Chapter 109) can be found in *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986). In December 1984 the carrier applied for ICC approval of a proposed transaction. Four unions *later* served bargaining demands that the carrier pro-

In other cases, a union may strike if a carrier implements an approved transaction without first seeking to change the existing collective bargaining agreement through the RLA major dispute procedures, as would have occurred in connection with the approved transaction involved in this case but for the strike injunction recently affirmed by the Eighth Circuit. See p. 4 *supra*. If the carrier should be required to utilize the RLA procedures, the result at a minimum will be delay in its ability to implement the approved transaction. And if at the end of those procedures the union has not agreed to change the collective bargaining agreement, then the carrier will face the choice either of foregoing what the Commission has approved as being in the public interest, or taking a strike.

C. The ICC, Following *BLE* v. *CNW*, Rightly Ruled That the Railway Labor Act Is Superseded.

Because the application of the RLA could defeat the Interstate Commerce Act scheme for approving mergers, etc. subject to employee protections, the Eighth Circuit, in the *BLE* v. *CNW* decision relied on by the Commission, ruled that the RLA was among the laws from which carrier participants in ICC-approved transactions are exempt. It relied in turn on the legislative history

---

vide them 6 months' advance notice of such proposed transactions. The ICC issued an order of approval on April 24, 1985 and the next day the unions sued to enjoin the transaction, arguing that the carrier in implementing the approved transaction had violated the RLA by changing the *status quo* during the pendency of bargaining demands. The complaint was dismissed for failure to state a claim upon which relief may be granted.

On many rail properties unions recently have served bargaining demands that if agreed to by the carriers would block or impede ICC-approved transactions. The carriers generally view the demands as nonmandatory subjects of bargaining. Some litigation on that score has commenced (*e.g.*, *Burlington Northern R.R.* v. *UTU*, No. 86-5013-CV-SW-C (D.Mo.)) and more is inevitable.

of the Transportation Act of 1940, which as noted above amended the Interstate Commerce Act to make employee protective conditions mandatory in Chapter 113 transactions. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, "'threatened to prevent all consolidations to which it related.'" *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, *supra*, 339 U.S. at 151).[20] Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-431.

---

[20] This Court, in *Brotherhood of Maintenance of Way Employes* v. *United States*, *supra*, 366 U.S. at 173-77, relied heavily upon the legislative history growing out of the Harrington amendment in rejecting a union contention that the predecessor of § 11347 required a "job freeze," and holding that compensatory employee protections are adequate.

The Eighth Circuit accordingly concluded that the RLA was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.[21]

That decision does not stand alone. Others to the same effect include *Brotherhood of Loc. Eng.* v. *Boston & Maine Corp.*, 122 LRRM 2020, 2025 (1st Cir., April 9, 1986) (ICC exemption of lease transaction and imposition of employee protections under § 10505 "exempted B&M from the conditions of the RLA with respect to major disputes."); *Missouri Pac. R.R.* v. *UTU*, 782 F.2d 107, 111 (8th Cir. 1986) (affirming district court holding "that MOPAC is exempted under § 11341(a) * * * from the requirements of the Railway Labor Act"); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protections ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are overridden by ICC-imposed order under § 5(2)(f) [now § 11347]); *UTU* v.

---

[21] In *BLE* v. *CNW* the employee protective conditions imposed by the ICC were agreed to by the carrier and the union before the merger. The statute permits the parties to make such pre-merger agreements and to submit them to the Commission for approval. 49 U.S.C. § 11347. If it approves, the agreement has the force of and becomes a Commission order. *Norfolk and Western Ry.* v. *Nemitz*, 404 U.S. 37 (1971).

Respondents may seek to distinguish *BLE* v. *CNW* by suggesting that the result there reflected a determination by the court that the union having agreed to the protective conditions thereby waived its ability to invoke RLA procedures. But no such analysis appears in the decision and in any event would be incorrect if it led to the conclusion that unions which do not enter into pre-merger agreements *are* free to invoke the RLA. As the Eighth Circuit ruled, the transaction is exempted from the restraints of the RLA to the extent necessary to carry out the transaction (314 F.2d at 432), not on a theory of union waiver but because otherwise unions could stymie Commission-approved transactions.

Norfolk & Western Ry., 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a specific exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Rail-Way Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied."

See *Kent* v. *CAB*, *supra*, 204 F.2d at 266, which held that a collective bargaining contract under the RLA "must yield to the paramount power of the [Civil Aeronautics] Board to perform its duties under the" Civil Aeronautics Act to approve mergers "upon such terms as it determines to be just and reasonable in the public interest." *Accord*, *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems attendant on such a merger"); see also cases cited note 8, p. 7, *supra*.[22]

---

[22] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike

D. Override of the Railway Labor Act Is Required in This Case.

The result reached in the many cases just mentioned has special—and we might add obvious—force in this case. The rights of the MKT and the DRGW to use their own crews were expressly recognized by the Commission to be material terms of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. Indeed, as we have noted, the MP's employees have already threatened and been enjoined from striking over this very matter.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver consequences. The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the MKT (for example) should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the MKT, Congress intended to permit MP employees to interfere with and possibly

---

over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the pattern of the national labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

shut down the MKT's entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban MKT trains with MKT crews, and the MKT's employees demand, upon pain of strike, that MKT not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate MKT trains obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of the approved trackage rights transactions. Thus the court's distinction is one without a difference. The rationale of that case is fully applicable to this one and the Commission adopted it in concluding that the carriers herein are exempt from the major dispute procedures of the RLA in implementing the approved trackage rights transactions.

III. SECTION 11341(a) IS SELF-EXECUTING

Section 11341(a) provides in pertinent part:

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." (Emphasis added.)

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. See *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[23]

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

---

[23] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194-195. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432. See *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, *supra*, 122 LRRM at 2025 ("We also note that the exemption provision, § 11341(a), is self-executing.").

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA would frustrate or impede an action intended to implement the approved transaction; if so, then the carriers are exempt from the RLA under § 11341(a); if not, the RLA may apply. The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a

grant of the application is in the public interest and otherwise comports with the standards specified therein.[24]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* and the other decisions cited above.

IV. THE 4-R ACT DID NOT AMEND THE LAW TO ALLOW THE RAILWAY LABOR ACT TO INTERFERE WITH TRANSACTIONS APPROVED BY THE COMMISSION

In the court below the respondents urged that the result in *BLE* v. *CNW* was overturned by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). Section 402(a) of that Act (90 Stat. 62) added a sentence to § 11347 (then § 5(2)(f)) requiring that henceforth the employee protective conditions to be imposed by the Commission shall be "no less protective * * * than those heretofore imposed pursuant to this subdivision and those *established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565)." (Em-

[24] This is not to say that an opponent of an application could not contend in the initial agency proceeding that the grant of the application would be contrary to the public interest in a particular case if the result would be to override rights under another statute such as the RLA. The Commission might well have a duty to consider such a contention, although no such contention was made in the initial agency proceeding below regarding the terms of the trackage right applications relative to crew selection.

phasis added.) The latter act created Amtrak and permitted railroads providing intercity passenger service to transfer that service to Amtrak by contract. Section 405 required such contracts to contain employee protective conditions certified as "fair and equitable" by the Secretary of Labor, and it directed the inclusion of such protective conditions as may be

> "necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; [etc.]."

On April 17, 1971, the Secretary approved and certified certain conditions which came to be known as the "Appendix C-1" conditions, so called because they were an appendix to the standard contract between Amtrak and the contracting railroads.[25] In keeping with § 405's direction, Article I, § 2 of those conditions included the following:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." [26]

Since that is one of the conditions "established pursuant to Section 405 of the" Amtrak Act, the Commission after

---

[25] In *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, 76 (D.D.C. 1971) the court upheld the Appendix C-1 conditions against a challenge from labor that they were insufficiently protective of employees.

[26] The Amtrak Appendix C-1 conditions are reproduced as an appendix to *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 90-96 (1977).

passage of the 4-R Act has included it (with minor changes) in those imposed under § 11347 of the Interstate Commerce Act. See, *e.g.*, Article I, § 2 of the *New York Dock* conditions, 360 I.C.C. at 84; see generally *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). Respondents asserted below that that condition imported the RLA into the implementation of transactions approved under Chapter 113.

We have shown above that the RLA, if it applied, would gravely threaten the success of the long-standing congressional goal of encouraging rail mergers and consolidations. A similar threat, in the form of the Harrington amendment forbidding changes in existing employment rights as a result of a merger, was turned back by Congress in 1940. Page 17, *supra*. It stands to reason that if by passage of the 4-R Act Congress meant to thrust the major dispute procedures of the RLA in the way of carrier efforts to implement ICC-approved mergers, and permit unions to delay and indeed strike over such efforts, some notice would have been taken. Yet the legislative history of the 4-R Act on this point is silent. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 93.[27] "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatl.*, 443 U.S. 256, 266-67 (1979); see *Watt* v. *Alaska*, 451 U.S. 259, 270-271 (1981).

---

[27] The provision which became § 402(a) of the 4-R Act first appeared in H.R. 10979, the House version of the Act, in identical form in all relevant respects to its final enactment. The House Report of the Committee on Interstate and Foreign Commerce accompanying the bill paraphrases but otherwise does not discuss the amendment. The Senate bill, S. 2718, contained no provision comparable to what became § 402(a). The Conference Report does not mention why the House-proposed amendment to § 5(2)(f) was agreed upon.

Floor debate concerning the meaning of employee protection provision in the 4-R Act was similarly limited. Only one Congressman, Representative Skubitz, commented on the extent of such protection and that comment came in the context of a provision mandating

The Commission's construction of the statute as preserving existing collective bargaining rights only to the extent that they do not conflict with the implementation of an approved transaction (Pet. App. 59a-60a), furthers rather than frustrates the goals of the Act and accordingly warrants respect here. *Hayfield Northern R.R.* v. *Chicago and North Western Transp. Co.*, 467 U.S. 622, 634 (1984) ("The Commission's position, of course, is entitled to considerable deference since it represents the construction of a regulatory statute by the agency charged with the statute's enforcement.").

The history of the Amtrak Act § 405 conditions further supports the Commission's construction. Section 405 was copied almost verbatim—and almost without discussion—from § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. app. § 1609(c).[28] That Act provided federal aid to state and local governments for the provision of mass transportation facilities and equipment. The purpose of § 13(c) was to preserve the collective bargaining rights of affected employes when federal funds were utilized to purchase a private transit company, since many state and local governments denied such rights to

---

employee protection arrangements in abandonments. That section, Congressman Skubitz stated, only provided "a restatement of what the Commission already does * * *." 121 Cong. Rec. 41340 (1975).

[28] Representatives of labor said that "[t]he protective provisions in this section are drawn literally from the comparable provisions of the Urban Mass Transportation Act of 1964 * * * and are designed to serve the identical policy expressed in these laws." *Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970) (Statement of Al H. Chesser, National Legislative Director, United Transportation Union, also representing the Congress of Railway Unions). Secretary of Labor Shultz noted: "I assume that the coverage under the protective arrangement provision * * * is substantially of the same scope as the protective arrangements provision * * * of the Urban Mass Transportation Act." *Id.* at 65 (letter from George P. Shultz).

their employees. See *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Authority*, 582 F.2d 444 (8th Cir. 1978).

It was not the intention of the Amtrak conditions, however, to allow collective bargaining rights and agreements to prevent implementation of an approved transaction. Rather, Article I, § 4, of Appendix C-1 (reproduced at 354 I.C.C. 90-91) provided for the negotiation of implementing agreements with respect to a transaction "which will result in a dismissal or displacement of employees or rearrangement of forces" (354 I.C.C. at 91) and, in default of such an agreement, for binding arbitration. Except for allowing greater expedition, which was justified by, among other things, "the time element written into the [Amtrak] statute," that provision in Appendix C-1 was patterned after Sections 4 and 5 of the Washington Job Protection Agreement as incorporated by the I.C.C. in prior employee protection conditions. *Congress of Railway Unions* v. *Hodgson, supra*, 326 F. Supp. at 75-76.[29] Sections 4 and 5 provided a means whereby prohibitions in collective agreements that would impede implementation of a transaction, such as a "prohibition against transferring work from one railroad to another," could be overcome without resort to the procedures of the Railway Labor Act. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 165 (1967). "[W]ithout something comparable to it, section 6 of the Railway Labor Act * * * would seriously impede mergers." *Id.* at 171. Thus, for example, an arbitration award under Art. I, § 4, of Appendix C-1 provided for

---

[29] The Act required Amtrak to commence passenger service within six months of its enactment. See 326 F. Supp. at 76. In the *Hodgson* case, the unions contended (unsuccessfully) that Sections 4 and 5 of the Washington Agreement should have been "incorporate[d] verbatim" into Appendix C-1, rather than that a provision for such implementing agreements and arbitration was inappropriate altogether. 326 F. Supp. at 75.

the use of Milwaukee engineers—rather than Burlington Northern engineers—in operating Amtrak trains over some 11 miles of BN track so as to eliminate an otherwise unnecessary stop to change crews east of Minneapolis. See *Engineers* v. *Burlington Northern, Inc.*, 92 LRRM 3436 (D. Minn. 1976).

As we have noted, the conditions imposed under § 11347 include a similar provision for implementing agreements and for arbitration in default of an agreement.[30] Indeed, in connection with the *New York Dock* transaction itself, an arbitration award arising out of that provision provided for consolidation of the employees and seniority rosters of the merged railroads as New York Dock employees subject to a common seniority roster under New York Dock's collective agreements, thus displacing the seniority roster and collective agreements of the carrier acquired by New York Dock insofar as its employees were concerned. See *Locomotive Engineers* v. *New York Dock Rail Road*, 94 Labor Cases ¶ 13,704 (E.D.N.Y. 1981), *subsequent opinion*, 97 Labor Cases ¶ 10,007 (E.D.N.Y. 1982).[31]

---

[30] Article I, § 4, of *New York Dock* (see 360 I.C.C. at 85) more closely followed Sections 4 and 5 of the Washington Agreement as incorporated in prior ICC protective conditions in that it did not include the greater expedition authorized by the cognate provision in Appendix C-1, while Article I, § 4, of the *Norfolk and Western* and *Mendocino Coast* conditions (see 354 I.C.C. at 610-611) did provide for such expedition. The unions supported the New York Dock conditions in *New York Dock Ry.* v. *United States, supra*, 609 F.2d 83, and objected (unsuccessfully) to the expediting aspects of the latter conditions in *Railway Labor Exec. Ass'n* v. *United States, supra*, 675 F.2d at 1248, but did not object then—as they did not object in regard to Appendix C-1—to provision for implementing agreements and arbitrations under which work and forces could be rearranged in a manner inconsistent with provisions in collective bargaining agreements. That tactic of so objecting was not adopted until after the terms of the employee protective conditions had been fixed.

[31] Such consolidation of seniority rights—which necessarily involves departures from collective agreement provisions—is among

In sum, virtually without discussion a provision conditioning federal grants on the willingness of local government to permit their mass transit employees to engage in collective bargaining has made its way into the employee protections provided under the Interstate Commerce Act. However, both the provenance of that provision and its application demonstrate that the Commission correctly concluded that the 4-R Act was not intended to amend existing law in a manner that would allow the RLA to interfere with transactions approved under Chapter 113 of the Interstate Commerce Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

KENNETH P. KOLSON
ASSOCIATION OF
AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

June 7, 1986

---

the more common functions of implementing agreements and arbitration under ICC protective conditions. See, *e.g.*, *Anderson* v. *Norfolk & Western Ry. Co.*, 773 F.2d 880 (7th Cir. 1985); *Employees Protective Ass'n* v. *Norfolk & Western Ry.*, 511 F.2d 1040, 1043 (4th Cir. 1975).